



COMMONWEALTH OF KENTUCKY  
**ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY**  
403 WAPPING STREET  
FRANKFORT, KENTUCKY 40601

**ANTHONY M. WILHOIT**  
Court of Appeals

**THOMAS J. KNOPF**  
District Court

**JOSEPH H. ECKERT**  
Circuit Court

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Judicial Ethics Opinion

JE-63

Formal

Question: A judge-elect is in partnership with the county's Commonwealth Attorney. When the judge-elect becomes judge, may he preside over any aspect of a criminal proceeding now pending trial or presently before the Grand Jury? The judge-elect had no participation in the criminal cases before the circuit court.

Answer: The judge should disqualify himself in any case which the Commonwealth attorney handled while they were in partnership together. New cases are left up to his discretion with due consideration given to the appearance of impropriety. SCR 4.300 Canon 3C(1)(b); Judicial Ethics Opinions JE-1, JE-1(Revised), JE-8, JE-32 and JE-41.

This opinion concerns a newly elected Circuit Judge who is presently in partnership with the county's Commonwealth attorney. When the judge-elect becomes judge, may he preside over any aspect of a criminal proceeding now pending trial or presently before the Grand Jury? The judge-elect had no participation in the criminal cases before the circuit court.

The committee believes that the Code and prior Judicial Ethics opinions mandate that the judge disqualify himself in every case which his law partner handled as Commonwealth's attorney during the time in which they were associated together. SCR 4.300, Canon 3C(1)(b) provides:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

- (a) . . . . .
- (b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter. . . . .

Judicial Ethics Opinion JE-1 covered the situation where a judge whose son was an attorney was required to disqualify himself in every case in which his son was involved. He could not wait for the parties to raise an objection, but was required to make his disqualification known and to withdraw from the case. Judicial Ethics Opinion JE-1 (Revised) outlined the steps whereby parties could waive the judge's disqualification. Like our question, JE-1 and JE-1(Revised) covered instances where disqualification was mandated by the Code.

In Judicial Ethics Opinion JE-8, the judge's son was a Commonwealth's attorney. The committee ruled that the judge should disqualify himself in all criminal cases in which his son was involved, but it was not necessary that he disqualify himself in other criminal cases.

Judicial Ethics Opinion JE-32 appears at first to be a departure from the previous opinions. In that opinion the Committee determined that a Judge who previously served as assistant county attorney need disqualify himself only in those cases in which he was actively involved. A government office is not like a law firm, said the Committee. A county attorney does not represent clients and does not obtain a financial interest in criminal litigation.

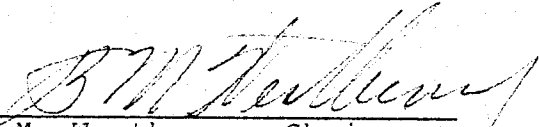
Some of these points are relevant to our question. The Commonwealth's attorney would keep his governmental duties separate from his private law practice and his law partners would not have any financial interest in his prosecutorial litigation. Of concern, however, is the appearance of impropriety.

The conflict is resolved by Judicial Ethics Opinion JE-41. In that opinion, the Committee decided that a judge need not always disqualify himself in new litigation handled by his former law firm after the judge left the firm. The Committee stated that since this situation was not covered specifically by the Code, it was left to the judge's discretion with due regard to be given to the appearance of impropriety.

Where a judge's former firm was associated with another firm in another city and the judge did not participate in those cases or share in the profits, the judge was required to disqualify himself in old

cases only. New cases were left up to his discretion. The reason was the appearance of impropriety. The public would not know the mechanics of the prior association of the two firms---how the work and the money were divided. They would know only that the two firms were associated and would assume improper conduct even if none existed.

The Committee believes that the same reasoning applies to this question. The public will know only that the judge-elect and the Commonwealth's attorney were in partnership together. They will not know that the Commonwealth's attorney kept his governmental work separate from his private law practice. Because of the appearance of impropriety, the judge should disqualify himself from all cases handled by the Commonwealth's attorney while they were in partnership together. New cases are left up to his discretion with due regard to be given to the appearance of impropriety.

  
B.M. Westberry, Chairman  
Judicial Ethics Committee